

MAY 21 1984

ALEXANDER L. STEVENS
CLERK

No. 83-6500

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

LONNIE JOE DUTTON,

Petitioner,

vs.

THE STATE OF OKLAHOMA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL/FEDERAL DIVISION
Counsel of Record

TOMILOU GENTRY LIDDELL
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, CRIMINAL DIVISION

112 State Capitol Building
Oklahoma City, Oklahoma 73105

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	4
Reasons Why Petition Should Be Denied.	7
PROPOSITION I	
SINCE THE PETITIONER'S WITNESS VIOLATED THE RULE AGAINST SEQUESTRATION WITH REGARD TO THE PROPOSED WITNESS THE PETITIONER'S MOTHER, NO CONSTITUTIONAL ERROR OCCURRED BY THE RE- FUSAL OF THE TRIAL JUDGE TO ALLOW HER TO TESTIFY; FURTHERMORE, THE FAILURE TO THE PETITIONER TO MAKE AN OFFER OF PROOF ALSO CONSTITUTES A FAILURE TO FOLLOW A STATE PRO- CEDURAL RULE.	7
PROPOSITION II	
THE RECORD AT TRIAL REVEALS THAT THE PETI- TIONER RECEIVED REASONABLE COMPETENT ASSIST- ANCE OF COUNSEL AT TRIAL.	8
Conclusion	10

TABLE OF AUTHORITIES

Cases Cited

Dutton v. State, 674 P.2d 1134 (Okla. Cr. 1984).	8, 9
Eddings v. Oklahoma, 455 U.S. 104 (1972).	7
Engle v. Isaac, 456 U.S. 107 (1982).	8
Geders v. United States, 425 U.S. 80 (1976).	7
Government of the Virgin Island v. Roberts, 84 F.R.D. 111 (D.St-Croix 1979)	8
Green v. Georgia, 442 U.S. 96 (1979).	7
Reeves v. International Telephone & Telegraph Corp., 616 F.2d 1342 (5th Cir. 1980).	8
Stone v. Wingo, 416 F.2d 857 (6th Cir. 1969).	8
Strickland v. Washington, ___ U.S. ___, (1984).	8
United States v. Warren, 578 F.2d 1058 (5th Cir. 1978).	7
Wainwright v. Sykes, 433 U.S. 72 (1977).	8
Williams v. Electronic Control Systems, 68 F.R.D. 703 (E.D. Tenn. 1975).	7

Statutes Cited

12 O.S.Supp.1978, § 2204(A)(2)	8
12 O.S.Supp.1978, § 2615	7
21 O.S.Supp.1976, § 701.7	2
21 O.S.Supp.1976, § 701.7(B)	6
21 O.S.Supp.1976, § 701.9.	2
21 O.S.Supp.1976, § 701.10	2
21 O.S.Supp.1976, § 701.11	2
21 O.S.Supp.1976, § 701.12	3
21 O.S.Supp.1976, § 701.13	3

Constitutional Provisions

U.S. Const., Fourteenth Amendment.	1
------------------------------------	---

Other Authorities Cited

28 U.S.C. § 1257(3).	1
----------------------	---

Fed.R.Evid., Rule 103(a)	8
Berger, <u>Evidence</u> , § 715.03 (1984).	8
Graham, <u>Handbook of Federal Evidence</u> , § 651.1 p. 600 (1981).	8

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

LONNIE JOE DUTTON

Petitioner,

vs.

THE STATE OF OKLAHOMA

Respondent.

On Petition for a Writ of Certiorari to the Court of
Criminal Appeals of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

The respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Criminal Appeals.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 674 P.2d 1134 (Okla. Cr. 1983).

JURISDICTION

The Opinion of the Oklahoma Court of Criminal Appeals was entered on January 6, 1984. A Petition for Rehearing was denied on January 31, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3)..

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Title 21 O.S.Supp.1976, § 701.7 provided in part:

"A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

Title 21 O.S.Supp.1976, § 701.9 provided in part:

"A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson."

Title 21 O.S.Supp.1976, § 701.10 provided as follows:

"Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Title 21 O.S.Supp.1976, § 701.11 provided as follows:

"In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which

it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

Title 21 O.S.Supp.1976, § 701.12 provided as follows:

"Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Title 21 O.S.Supp.1976, § 701.13 provided as follows:

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by a clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

STATEMENT OF THE CASE

On January 2, 1979, Eddie Kiplinger, his brother and a friend went to the Cottage Bar in Oklahoma City, during the noon hour for lunch (Tr. 210). As the group ate soup and drank beer, the Petitioner entered alone, sat down at the end of the bar and ordered a beer (Tr. 211). Wanda Honeycutt, who was helping her son, Dale Gray, run the bar, served the Petitioner his beer (Tr. 360, 361). After the Kiplinger party finished lunch, they left the bar to collect a bad check nearby (Tr. 212). When they left, the only remaining people in the bar were Honeycutt, Gray and the Petitioner (Tr. 362).

The Petitioner then pulled out a loaded gun and pointed it at Honeycutt and Gray (Tr. 362). He told Ms. Northcutt to lay on the floor behind the bar and told Dale Gray to put all of the money in the cash register into a brown paper bag (Tr. 362-363).

As Dale Gray begged for mercy, the Petitioner shot him several times and then shot Wanda Northcutt in the chin (Tr. 363-364). The Petitioner paced around the room and then shot Ms. Northcutt again in the arm and head (Tr. 364-365).

Eddie Kiplinger then returned to the Cottage Bar and found the body of Dale Gray lying in a pool of blood behind the bar (Tr. 212). Ms. Northcutt was transported to a nearby hospital where she subsequently recovered from her wounds, except that she is now partially paralyzed and restricted to a wheelchair (Tr. 225, 367).

At trial, Kiplinger and Northcutt both positively identified the Petitioner as the man who entered the Cottage Bar and shot Wanda Northcutt and Dale Gray (Tr. 211, 361).

On January 5, 1979, the Petitioner made a voluntary statement to police after being fully informed of the Miranda warnings (Tr. 273). On January 11, 1979, the Petitioner again waived his right to remain silent after being given the Miranda warnings, and made a voluntary statement to police (Tr. 275-278). At trial, the Petitioner's confession (State's Exhibit No. 16), was read into evidence (Tr. 344-349). In that confession, the Petitioner admitted that he shot both victims and robbed the Cottage Bar while Carl Shelton Morgan waited outside in the car (Tr. 347-348). The Petitioner also stated that he received Seventy Dollars (\$70.00) for his participation in the robbery-murder (Tr. 348). The Petitioner also told the officers that he had gotten blood on the coveralls which he had been wearing and discarded them by the side of a nearby bar after the murder (Tr. 347-348). Oklahoma City Police Detective Les McCaleb testified at trial that he found the blood-stained coveralls outside of the Tinker Tavern on January 9, 1979 (Tr. 279, 282).

In the second stage of the trial, Joe Seija testified that on January 3, 1979, the day after the murder, the Petitioner and Morgan robbed the Sipango Bar in Oklahoma City while Seija and a waitress were forced at knifepoint and gunpoint to lie face down on the floor behind the bar (Tr. 444-450). The Petitioner stuck a knife partially into the backs of both victims and stated to

Morgan, "let's kill them." (Tr. 450). However, Carl Morgan refused and the pair quickly fled the scene (Tr. 451). Joe Seija positively identified the Petitioner at trial as the man who robbed him and wanted to kill him (Tr. 446).

State's witness Ruby Dixon testified during the second stage of the trial concerning the robbery of the Agnew Bar on January 1, 1979, the day before the shootings at the Cottage Bar (Tr. 460). Ms. Dixon stated that she left the bar at approximately 10:00 p.m. and that her niece, Wilma Speaks, was left there by herself to close the bar (Tr. 460). When Ms. Dixon arrived the following morning to open for business, she found Wilma Speaks dead behind the bar and fifty-eight dollars (\$58.00) missing from the cash register, along with Ms. Speaks' wallet and necklace (Tr. 462-463). Oklahoma City police officer William Cook stated that he investigated the murder scene and found that Ms. Speaks had been shot numerous times in the head and back (Tr. 466-467).

Detective Les McCaleb also testified that the Petitioner made a voluntary statement to the police on January 11, 1979, after being fully advised of his rights (Tr. 469-470). State's Exhibit No. 21, the Petitioner's signed confession, was then read into evidence (Tr. 475-481). In that statement, the Petitioner admitted that he participated in the robbery of the Agnew Bar on January 1, 1979, but that Carl Morgan shot and killed Wilma Speaks while he watched (Tr. 479).

Based on this and other corroborative evidence the jury convicted the Petitioner of Murder in the First Degree in violation of 21 O.S.Supp.1976, § 701.7 and found two (2) aggravating circumstances: (1) that the Petitioner had knowingly created a great risk of death to more than one person and (2) the existence of the probability that the Petitioner would commit criminal acts of violence that would constitute a continuing threat to society, and sentenced him to death (Tr. 548).

REASONS WHY PETITION SHOULD BE DENIED

PROPOSITION I

SINCE THE PETITIONER'S WITNESS VIOLATED THE RULE AGAINST SEQUESTRATION WITH REGARD TO THE PROPOSED WITNESS THE PETITIONER'S MOTHER, NO CONSTITUTIONAL ERROR OCCURRED BY THE REFUSAL OF THE TRIAL JUDGE TO ALLOW HER TO TESTIFY; FURTHERMORE, THE FAILURE TO THE PETITIONER TO MAKE AN OFFER OF PROOF ALSO CONSTITUTES A FAILURE TO FOLLOW A STATE PROCEDURAL RULE.

The Petitioner contends that error was committed when the trial court refused to permit the Petitioner's mother to testify at the second stage of the trial with regard to proposed mitigating circumstances. Eddings v. Oklahoma, 455 U.S. 104 (1972). The Petitioner apparently concedes that the Oklahoma rule of evidence regarding sequestration of witnesses was violated but that the mandate of Green v. Georgia, 442 U.S. 96 (1979) should have compelled the trial court to allow the Petitioner's mother to testify regardless.

The State contends that the rule against sequestration is a valid State procedural rule which Oklahoma has a right to enforce both at the trial and at the sentencing stage. The rule was in effect by statute in Oklahoma at the time of Petitioner's trial. 12 O.S.Supp.1978, § 2615. The rule of sequestration is embodied in the Federal Rules of Evidence as well. Fed.R.Evid., 615.

This Court has also recognized the trial court's power to sequester witnesses before, during and after their testimony. Ceders v. United States, 425 U.S. 80, 87 (1976). The Court in Ceders recognized that the "rule on witnesses" "exercises a restraint on witnesses in 'tailoring' their testimony to that of other witnesses; and it aids in detecting testimony that is less than candid." The State contends that his rationale are no less important in the sentencing stage of a trial than at the trial itself.

The rule has been held to be appropriate in other than trial settings. United States v. Warren, 578 F.2d 1058, -1076 (5th Cir. 1978) (pretrial suppression hearings); Williams v. Electronic Control Systems, 68 F.R.D. 703 (E.D. Tenn. 1975). A witness for either side at the sentencing stage could shape or tailor his or

her testimony in a way which would be unfair to the State.

The Petitioner knew that he was facing the possibility of the death penalty in the present case since a Bill of Particulars had been filed (O.R. 8-9). Therefore, there is no reason why he should not have been able to comply with the Rule with regard to following the court's directive to sequester his mother, a potential witness.

Furthermore, refusal by trial court to permit a witness who has violated the Rule of Sequestration to testify is a common sanction. Reeves v. International Telephone & Telegraph Corp., 616 F.2d 1342, 1355 (5th Cir. 1980). Stone v. Wingo, 416 F.2d 857, 867 (6th Cir. 1969); Government of the Virgin Islands v. Roberts, 84 F.R.D. 111 (D.St-Croix 1979); See also Graham, Handbook of Federal Evidence, § 651.1 p. 600 (1981) and Weinstein and Berger, Evidence, § 615.03 (1984).

Additionally, the Oklahoma Court of Criminal Appeals opinion affirming the Petitioner's conviction noted that the Petitioner failed to comply with another State procedural rule, the requirement that he make a record of the proposed evidence which was excluded, which is commonly referred to as making an offer of proof. Dutton v. State, 674 P.2d 1134, 1140 (Okla.Cr. 1984). This also is required by the Oklahoma Evidence Code as was noted in the Court's opinion. 12 O.S.Supp.1978, § 2204(A)(2). See also, Fed.R.Evid., Rule 103(a).

Therefore, since the Petitioner at trial failed to comply with a valid State procedural rule, he cannot be heard to claim that this was a constitutional error. Cf. Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).

PROPOSITION II

THE RECORD AT TRIAL REVEALS THAT THE PETITIONER RECEIVED REASONABLE COMPETENT ASSISTANCE OF COUNSEL AT TRIAL.

The Petitioner contends that he did not receive the effective assistance of counsel at trial. It should be noted initially that the only allegation of this nature made on appeal in the Oklahoma Court of Criminal Appeals was one with regard to the actions of trial counsel when the Petitioner refused to take the

witness stand when called by his attorney due to fright on the part of the Petitioner. Therefore, the Petitioner's contentions with regard to competency of trial counsel set forth in his Petition with this Court on pages 9 and 10 of his Petition have not been presented to the Oklahoma Court of Criminal Appeals, except for the one referred to in paragraph "D" on page 10. In reviewing this claim the Oklahoma Court of Criminal Appeals applied the "reasonably competent assistance of counsel standard." Dutton v. State, supra, 674 P.2d at 1139.

With regard to the allegation concerning the trial counsel's asking the Petitioner to take the witness stand, the evidence at trial revealed that when called the Petitioner refused to take the witness stand. (Tr. 376). The trial court immediately recessed the proceedings and spoke to the Petitioner in chambers. (Tr. 376). The trial court carefully explained to the Petitioner his options of whether or not he chose to testify. (Tr. 377, 379). The Petitioner did not respond to any of the trial court's questions but remained silent. (Tr. 379). The trial court noted during the in-camera hearing that the Petitioner sat there and shook. (Tr. 380). The Court also observed that the evidence before the Court was that the Petitioner's reluctance to testify was motivated by fear and not any lack of mental capacity. (Tr. 380).

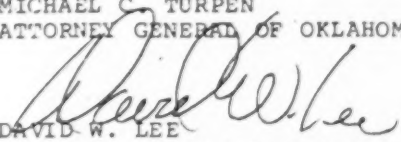
The conduct by the trial attorney hardly constitutes incompetency of counsel. In Strickland v. Washington, ___ U.S. ___, (1984) this Court recently held that every effort in assessing the defense attorney's performance during a trial required that every effort be made to eliminate "the distorting effects of hindsight" and to evaluate the conduct "from counsel's perspective at the time." Furthermore, the Court held that a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." In view of the evidence presented which has heretofore been set forth in detail it cannot be said that the outcome was effected by what occurred.


CONCLUSION

For the reasons stated it is respectfully requested that the Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA


DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL/FEDERAL DIVISION

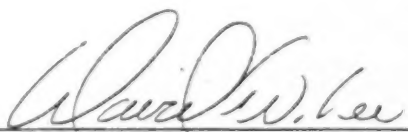

TOMILOU GENTRY LIDDELL
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, CRIMINAL DIVISION
112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF MAILING

On this 21st day of May, 1984, a true and correct copy of the foregoing was mailed, postage prepaid, to:

James W. Berry
2500 First City Place
Oklahoma City, OK 73102



DAVID W. LEE

:bks